IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	
	:	**No. 04-253**
DEBRA ANN NULL	:	

MEMORANDUM AND ORDER

Schiller, J. **June 28, 2005**

Defendant Debra Ann Null moves for release pending appeal of her 21 month sentence. For the reasons set forth below, Defendant's motion is denied.

I. BACKGROUND

From 1995 to 2001, Defendant worked at Pickering Valley Landscape, Inc. as a bookkeeper and secretary. (R. at 16, 20 (May 18, 2005).) On April 30, 2004, the Government charged Defendant with one count of mail fraud in violation of 18 U.S.C. § 1341 (2005) and one count of bank fraud in violation of 18 U.S.C. § 1344 (2005). The mail fraud charge stemmed from allegations that between 1998 and 2001, Defendant used the mails to advance a scheme that defrauded Pickering Valley of $413,427.26. According to the Government, Defendant wrote unauthorized checks from Pickering Valley to pay her personal expenses. (Information ¶¶ 1-15.) Moreover, the Government alleged that Defendant committed bank fraud by devising and executing a scheme to defraud Elverson National Bank by negotiating unauthorized checks totaling $86,496.39 from Pickering Valley's accounts at the Bank. (*Id*. ¶¶ 16-20.)

On January 21, 2005, Defendant pled guilty to both counts in the Information. Defendant's guilty plea did not, however, specify the amount of loss caused by her crimes. (R. at 25-26 (Jan. 21, 2005).) On May 18, 2005, this Court sentenced Defendant to 21 months in prison, and also ordered Defendant to pay $499,923.65 in restitution to Pickering Valley.[1] (R. at 46-48, 50 (May 18, 2005).) The Court set a surrender date of July 15, 2005. Defendant's sentence was issued in accordance with the Supreme Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and was based in part on facts not stipulated to by Defendant in her guilty plea. Defendant has now moved to remain free while she appeals this Court's sentence to the Third Circuit. She argues that retroactive application of *Booker* denies her due process of law by permitting a sentence greater than that which could have been imposed based solely on the facts admitted in her guilty plea.

II. STANDARD OF REVIEW

The grant of bail pending appeal is governed by 18 U.S.C. § 3143(b), which mandates that a person who has appealed their sentence to a term of imprisonment "shall . . . be detained, unless" the court finds "(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any person of the community if released . . . and (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order

[1] Under the Federal Sentencing Guidelines, sentences for mail and bank fraud are calculated in part by adding together a Base Offense level (which is 6 for each crime) together with a Specific Offense Characteristic level (which ranges from 0-34). *See* U.S.S.G. § 2F1.1 (2000); § 2B1.1 (2005). One primary ingredient of the Specific Offense Characteristic level is the amount of loss caused by the defendant's crimes. The more money stolen, the more levels are added, and the longer the sentence. *See generally* § 2F1.1(b)(1); § 2B1.1(b)(1). Here, without any finding as to the amount of loss caused, Defendant's sentencing range, with a Base Offense Level of 6, would be 0-6 months. *See* U.S.S.G. Sentencing Table.

for new trial." 18 U.S.C. § 3143(b) (2005). If a court makes such findings, then it "shall order the release of the person." *Id.*

The Third Circuit has held that a defendant requesting bail pending appeal must carry the burden of persuasion on the four prongs of § 3143(b), i.e., show that she is not: (a) a flight risk or (b) a danger to the community; that (c) the appeal is not made for purposes of delay; and that (d) the question raised on appeal is "substantial." *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985). In turn, a "substantial" question is one which is "*significant* in addition to being novel, not governed by controlling precedent or fairly doubtful." *United States v. Smith*, 793 F.2d 85, 88 (3d Cir. 1986) (emphasis in original). Finally, this "substantial" issue must be "sufficiently important to the merits that a contrary appellate ruling is likely to require reversal or a new trial." *Miller*, 753 F.2d at 23.

III. DISCUSSION

A. Overview: *Apprendi, Blakely* and *Booker*

In *Apprendi v. New Jersey*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). As a result, a sentencing scheme which permits a judge to find facts that could increase a sentence beyond a statutory maximum violates the Sixth Amendment's guarantee of trial by jury. *Id.*

Four years later, in *Blakely v. Washington*, the Supreme Court clarified the term "statutory maximum" when it applied *Apprendi*'s rule to the State of Washington's sentencing guidelines. 125 S. Ct. 2531 (2004). The Court held that even sentences beneath the maximum length authorized by statute were unconstitutional if dependent on facts found by a judge. The Court stated, "the

'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 2537 (emphasis in original). Thus, the statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*. (emphasis in original). Although *Blakely* "express[ed] no opinion on" the Federal Sentencing Guidelines, *id*. at 2538 n.9, the holding cast serious doubt upon the constitutionality of those Guidelines's mandatory sentencing scheme because, as Justice O'Connor noted in her dissent, "Washington's [invalidated] scheme is almost identical to" the relevant Federal Guidelines. *Id*. at 2549 (O'Connor, J., dissenting).

United States v. Booker resolved this uncertainty. 125 S. Ct. 738 (2005). *Booker* included two separate majority opinions – a "constitutional" holding by Justice Stevens and a "remedial" holding by Justice Breyer. In the first, the Court extended *Blakely*'s reasoning to the Federal Guidelines. *Booker*, 125 S. Ct. at 755. Accordingly, the Court held that any mandatory sentencing scheme (including the Federal Guidelines) violates a defendant's Sixth Amendment jury trial rights if it permits a judge to find facts necessary to support a sentence exceeding the maximum authorized by the facts admitted by the defendant or proven to a jury beyond a reasonable doubt. *Id.* Justice Breyer's opinion provided the remedy to the Federal Guidelines's constitutional infirmity. *Id*. at 756-71. The remedial opinion severed and excised the provisions of the Federal Sentencing Act that made the Federal Guidelines mandatory. *Id*. at 756-57. "So modified, the Federal Sentencing Act makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id*. at 757.

B. Application

Defendant argues that any sentence longer than 6 months denies her due process of law. According to Defendant, *Blakely*'s rule (and Justice Stevens's Constitutional majority opinion in *Booker*) should be applied to her, and together dictate that her maximum sentence must derive solely from the facts admitted in her guilty plea. As noted above, Defendant pled guilty to mail and bank fraud but did not stipulate to the amount of loss caused by her crimes. Therefore, Defendant argues that her maximum sentence must be based solely on the Base Offense level for mail and bank fraud, which results in a sentence of 0-6 months. Justice Breyer's remedial opinion in *Booker*, however, recast the Sentencing Guidelines as merely advisory upon district courts. This change served to permit a sentence above 6 months, as it allowed the Court to sentence her outside the once-mandatory Federal Guidelines range. Defendant charges that retroactive application of *Booker*'s remedial opinion is thus an ex post facto deprivation of her due process rights, as it constitutes an unforeseeable judicial enlargement of a criminal statute, applied retroactively. Defendant asserts that, because this due process issue presents a "substantial question of law," she should be granted release on bail pending her appeal of this Court's sentence to the Third Circuit. *See* 18 U.S.C. § 3143(b)(2).[2]

The Court rejects Defendant's argument. Even assuming that *Blakely* did apply to the Federal Guidelines, *Booker*'s remedial opinion did not change the relevant legal landscape so as to deny Defendant the "fair warning" guaranteed by the Due Process Clause of the Fifth Amendment.

[2] The Government does not dispute that Defendant has satisfied the other three prongs of § 3143(b): She is not a flight risk or a danger to the community, and her appeal has not been made for purposes of delay. Therefore, under *Miller*, if Defendant carries her burden on the "substantial question" issue, she will be granted release pending appeal. 753 F.2d at 23.

Defendant had ample warning of the maximum punishment that her criminal conduct could generate *before* she engaged in that conduct. Therefore, her due process rights were not violated by *Booker*, or by this Court's sentence issued pursuant to it, and her argument does not consist of a "substantial question" for purposes of her appeal. *Miller*, 753 F.2d at 23.

1. The Ex Post Facto Clause and Due Process

Article I of the United States Constitution provides that neither Congress nor any state may pass any ex post facto law. *See* U.S. CONST. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. An ex post facto law is one which applies retroactively to disadvantage an offender's substantial personal rights. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Dobbert v. Florida*, 432 U.S. 282, 292-93 (1977). Over two hundred years ago, Justice Samuel Chase explained that "[t]he Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime."[3] *Calder v. Bull*, 3 U.S. 386, 389 (1798).

But, as is clear from the Constitutional text, "[t]he Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the judicial branch of government." *Marks v. United States*, 430 U.S. 188, 191 (1977); *see also Rodgers v. Tennessee*, 532

[3] Justice Chase identified four types of laws to which the Ex Post Facto Clause extends:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390 (1798).

U.S. 451, 462 (2001) (stating plainly that "the Ex Post Facto Clause does not apply to judicial decisionmaking"). Nonetheless, the prohibition on ex post facto laws embodies "one of the most widely held value-judgments in the entire history of human thought," that is, that there should be no punishment without a law authorizing it. *Rodgers*, 532 U.S. at 467-68 (Scalia, J., dissenting) (quotation omitted). This principle – "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty." *Marks*, 430 U.S. at 191; *see also United States v. Harriss*, 347 U.S. 612, 617 (1954), *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Therefore, the Due Process Clause of the Fifth Amendment protects offenders from judicial decisions that retroactively alter the import of a law to negatively affect the offender's rights without providing fair warning of that alteration. *See Marks*, 430 U.S. at 192.

Bouie v. City of Charleston first explained the similarity between ex post facto laws passed by a legislature and judicial decisions that, if applied retroactively, impact due process rights. 378 U.S. 347 (1964). *Bouie* involved a "sit-in" by civil rights activists at a lunch counter in South Carolina. *Id*. at 347-48. South Carolina's criminal trespass statute prohibited "entry upon the lands of another . . . after notice from the owner" prohibiting such entry. *Id*. at 349 (*quoting* § 16-386 South Car. Code 1952 (1960 Cum. Supp.)). During the course of the petitioners' state court appeals in *Bouie*, however, the South Carolina Supreme Court "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id*. at 350. The Supreme Court held that the South Carolina Supreme Court's "unforeseeable judicial enlargement of a criminal statute, applied retroactively, operate[d] precisely like an ex post facto law," and therefore

violated petitioners' due process right of fair warning. *Id*. at 353. Just as legislatures are barred from passing laws that unforeseeably enlarge criminal statutes by the Ex Post Facto Clause, so are courts "barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. at 353-54.

Marks v. United States clarified the due process implications of judicial constructions which unforeseeably expand the reach of statutes. 430 U.S. 188 (1977). Petitioners in *Marks* were convicted of transporting "obscene materials." After petitioners' arrest, but before their trial, the Supreme Court expanded the definition of "obscenity" in *Miller v. California*, 413 U.S. 15 (1973). The trial court read jury instructions using the new, broader standard instead of the prior, narrower, definition of obscenity that was in place at the time of petitioners' activities. *Marks*, 430 U.S. at 190-91. The Supreme Court held that these jury instructions denied petitioners due process of law because, at the time of their actions, they had "no fair warning that their products might be subjected to the [*Miller*] standards." *Id*. at 195. As such warning is "fundamental to our concept of constitutional liberty," it is "protected against judicial action by the Due Process Clause of the Fifth Amendment." *Id*. at 191-92. Therefore, the Court overturned petitioners' convictions not because the jury instructions violated any specific category of ex post facto law delineated in *Calder*, but because of the fundamental right of all defendants to have "fair warning," *ex ante*, that their contemplated conduct is illegal.

In *Rodgers v. Tennessee*, the Supreme Court reasserted that the due process limitations on retroactive application of judicial decisions do not "incorporate jot-for-jot the specific [ex post facto] categories of *Calder*," but rather apply "in accordance with the more basic and general principle of fair warning." 532 U.S. at 459. *Bouie*'s "rationale rested on core due process concepts of notice,

foreseeability, and, in particular, the right of fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct . . . and we couched its holding squarely in terms of that established due process right." *Id*. In sum, the central question to be asked in deciding whether retroactive application of a judicial decision violates due process is whether the Defendant had fair warning of the potential punishment at the time she engaged in the criminal conduct.[4]

2. The Defendant

In this case, Defendant had exactly the same notice of the potential punishment for her crime at the time she engaged in that activity that she had after *Booker* was decided. *Booker* therefore did nothing to deprive her of the "fair warning" that is guaranteed by the Due Process Clause. As demonstrated below, the United States Code and the Federal Guidelines in place at the time Defendant began her criminal activity gave her more than adequate notice of the potential consequences of her activities.

In 1998 (the year Defendant began her criminal activity), the federal mail fraud statute alerted her that anyone devising a scheme to defraud who uses the mails for the purpose of executing that scheme could be imprisoned for up to five years. *See* 18 U.S.C. § 1341. Additionally, the federal bank fraud statute informed Defendant that anyone who knowingly executes a scheme to obtain

[4] The Court notes that this question is distinct from those which the Supreme Court has confronted in *Bouie*, *Marks*, and *Rodgers*. In those cases, the question was whether judicial constructions that criminalized conduct *innocent* at the time it occurred implicated due process rights. Here, by contrast, it is undisputed that mail and bank fraud were criminal at the time Defendant acted – the question, instead, is whether judicial construction that *enlarges the penalty* for that conduct also implicates Defendant's due process rights. Although neither the United States Supreme Court nor the Third Circuit has addressed this question, the Court assumes for purposes of this motion that such enlargement would constitute a due process violation. Even so assuming, however, no such enlargement occurred here.

property under the custody of a financial institution by means of false pretenses could face up to thirty years in prison. *See* 18 U.S.C. § 1344. Finally, the Federal Guidelines in place at the time notified Defendant that a judge would find facts, by a preponderance of the evidence, to determine her sentence based in part on the amount of loss involved, and that if a judge found that Defendant had caused a loss of between $350,000 and $500,000, that Defendant could be sentenced to 21 months in prison. *See* 18 U.S.C. § 3551(a); U.S.S.G. § 2F1.1(b); U.S.S.G. Sentencing Table.

Because *Booker* did nothing to alter these penalties, Defendant was on notice, *ex ante*, of the repercussions of her criminal behavior, and the retroactive application of Justice Breyer's remedial decision in *Booker* does not violate Defendant's due process rights. Every federal court to be confronted with similar arguments has reached the same conclusion. *See United States v. Duncan*, 400 F.3d 1297, 1306-08 (11th Cir. 2005) (rejecting identical argument and stating "[w]e readily conclude that [defendant] had sufficient warning to satisfy the due process concerns articulated in *Rodgers v. Tennessee*" because U.S. Code informed defendant of maximum punishment and Federal Guidelines informed him that judge would engage in fact-finding to determine sentence); *United States v. Scroggins*, Crim. A. No. 30481, 2005 U.S. App. LEXIS 10377, at *10, 2005 WL 1324808, at *3 (5th Cir. June 6, 2005) (rejecting similar due process challenge and stating "[t]here is no warrant for not applying Justice Breyer's *Booker* opinion to this case"); *United States v. Gray*, 362 F. Supp. 2d 714, 728 (S.D. W. Va. 2005) (holding that "defendants in this case had fair warning of the potential consequences of their actions by virtue of the statutory maximums set by the United States Code," and distinguishing case from defendants in *Bouie* and *Marks* "who learned that their conduct, innocent when done, had become a crime after the fact"); *United States v. Correa*, Crim. A. No. 02-0092-C-04, 2005 U.S. Dist. LEXIS 8781, at *3, 2005 WL 1113817, at *1 (W.D. Wis. May

10, 2005) (rejecting similar argument and holding that defendant "had fair warning of the maximum possible sentence when she committed her crime"); *United States v. Stanley*, Crim. A. No. 02-40122-02-SAC, 2005 U.S. Dist. LEXIS 8944, at *16-*17 (D. Kan. Apr. 5, 2005) (noting, when confronted with identical argument, that "defendant's due process challenge has been advanced in other courts and soundly rejected . . . . The court finds the reasons in those decisions convincing and compelling.").

The only lack of fair warning of which Defendant could possibly complain relates to how she *structured* her guilty plea once she had committed her crimes, been charged, and decided to plead guilty. After *Blakely*, but before *Booker*, Defendant may have thought that by not stipulating to a loss amount in her guilty plea she was protected from any increase in sentence based upon the amount of loss caused, and could thereby limit her punishment to 6 months in prison.

But this is not the type of "fair warning" that the Due Process Clause guarantees to defendants. Rather, the constitutional right is implicated when individuals are not provided notice of the consequences of certain conduct *before they engage in that conduct*. As stated in *Harriss*, criminal statutes must "give a person of ordinary intelligence fair notice that his *contemplated conduct* is forbidden by the statute." *Harriss*, 347 U.S. at 617 (emphasis added); *see also Rodgers*, 532 U.S. at 459 ("attaching criminal penalties to what previously had been innocent conduct" implicates due process right); *Marks*, 430 U.S. at 191 (stating defendants have a due process "right to fair warning of that conduct *which will* give rise to criminal penalties") (emphasis added).

By contrast, the retroactive application of *Booker*'s remedial opinion to Defendant does not result in an unforeseeable judicial expansion of her sentence. Instead, Defendant had full notice, in 1998, thatthe statutory maximums for her crimes were 5 and 30 years, respectively; that a Court

would engage in fact-finding to determine her sentence; and that defrauding another of between $350,000 and $500,000 could result in a 21 month prison term. Therefore, *Booker*'s remedial opinion did not deprive Defendant of her due process right to fair warning of the possible punishment for her criminal activity.

The Third Circuit has not yet decided this question. That alone, however, does not mean that Defendant's question on appeal is "substantial" for purposes of § 3143(b)(2). *See Smith*, 792 F.2d at 86. *Smith* emphasized that in addition to being undecided by controlling precedent, the issue raised on appeal must be "fairly debatable," i.e., that the question raised is "adequate to deserve encouragement to proceed further." *Id*. at 89 (quotation omitted). Here, both because of the clear import of the Supreme Court's jurisprudence in *Bouie*, *Miller*, and *Rodgers*, and because every court to confront this question has ruled the same way, Defendant has not met her burden of showing that her due process argument raises a "substantial question" for appeal.

IV. CONCLUSION

For the reasons stated above, Defendant's motion is denied. An appropriate Order follows.

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UNITED STATES OF AMERICA	**:**	
	:	**CRIMINAL ACTION**
v.	**:**	
	:	**No. 04-253**
DEBRA ANN NULL	**:**	

ORDER

AND NOW, this **28th** day of **June, 2005**, upon consideration of Defendant's Motion for Release Pending Appeal (Document No. 18), the Government's Opposition thereto (Document No. 19), and for the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

BY THE COURT:

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Berle M. Schiller, J.